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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5250

JAMES HERMAN BOSTIC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has been reported sub nom *United States v. Etheridge*, at 424 F.2d 951 (6th Cir. 1970).

No formal opinions were filed by the United States District Court for the Middle District of Tennessee, and none has been reported.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered final judgment April 20, 1970, affirming the petitioner's conviction in three counts of violating 18 U.S.C. §§ 371, 2113(c) and 2113(d). The petition for certiorari was filed May 19, 1970, invoking the Court's jurisdiction pursuant to 28 U.S.C. § 1254(1), and certiorari was granted January 11, 1971.

CONSTITUTIONAL AND STATUTORY PROVISIONS

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ." (U.S. Const. amend V, Corwin ed. (1953), S. Doc. No. 170, 82nd Cong., 2nd Sess., p. 40.)

"In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence." (*Id.*, amend. VI, p. 41.)

"If two or more persons conspire either to commit any offense against the United States . . . in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both." (18 U.S.C. § 371.)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Star Chamber conspiracy doctrine, particularly with respect to its free-wheeling evidentiary rules, has been invalidated by this Court's recent rulings on the Constitutional right of confrontation and cross-examination.

2. If not, whether the petitioner was nevertheless deprived of due process of law upon consideration of the totality of circumstances of this case, including (a) publicity generally and about this particular case which the trial court assumed was capable of prejudicing prospective jurors; (b) gross abuse of the conspiracy evidentiary exceptions; (c) intentionally prejudicial joinder of defendants and offenses; (d) highly inflammatory prosecution tactics; (e) broad leave to the government to cross-examine its own witnesses using multiple hearsay as to highly prejudicial collateral matters; (f) inadequate jury instructions; and (g) confusion of issues both on trial and on appeal.

3. Whether the Court of Appeals erred in presuming that the petitioner continued to participate in the alleged conspiracy after his arrest.

STATEMENT OF THE CASE

I. THE CHARGES

The eight-count indictment in this case (App. 1-5), named this petitioner a defendant in only three counts. And these three counts effectively charged him with committing only one overt criminal act—the robbery of a bank on April 24, 1967, as set out in Count Two. In Count One he was charged with conspiring to rob banks and with a single overt act—the same bank robbery. Count Three charged him with the included offense of possessing the proceeds of the same bank robbery on the same date.

Yet, by the magic of the conspiracy count he was, in effect, held to answer for a whole series of crimes ranging

from his own escape from the Tennessee State Penitentiary on April 11, 1967, to a murder that occurred on September 23, 1967, more than three months after the petitioner had been returned to the State Penitentiary.

The series of crimes, some of them referred to but not charged in the indictment, some not mentioned at all in the indictment, and others charged only against co-defendants, included:

1. The petitioner's escape, which the United States Attorney said he would show, but never did prove, was "for the purpose" of adjoining the conspiracy. (App. 106, 479).

2. Thefts of automobiles that were later allegedly used in the April 24 robbery and getaway. (App. 336-92; R. 1162.)

3. Interstate flight to avoid confinement for a felony, 28 U.S.C. § 1073. (Count One, Overt Act 8; Count Four.)

4. Trying to induce another to join the conspiracy on May 3, 1967. (Count One, Overt Act. 4)

5. Planning an intended bank robbery in May, 1967. (Count One, Overt Act. 5.)

6. Entering a bank to commit larceny on May 15, 1967. (Count One, Overt Act 6.)

7. Possessing an unregistered firearm on June 5, 1967, in violation of 28 U.S.C. §§ 5851 and 5861. (Count One, Overt Act 5; Count Five; App. 479-80.)

8. Being harbored and concealed as a fugitive in violation of 18 U.S.C. § 1071. (Count One, Overt Act 8; Count Four; App. 474-80.)

(The last two above arose upon the petitioner's arrest June 5, 1967, and the offenses listed below all allegedly occurred after he had been returned to the State Penitentiary.)

9. Theft of a car that was used in a bank robbery August 3, 1967. (R. 1166, 2347 *et seq.*)

10. Robbery of a bank August 3, 1967. (Count One, Overt Act 9; Counts Six and Seven.)

11. The murder of Larry "Kingfish" Ferguson, an alleged co-conspirator, to keep him from talking to authorities. (Count One, Overt Acts 10 and 11; Count Eight.)

The petitioner's court-appointed counsel, either directly or by adopting the motions of others, sought relief from this obviously prejudicial joinder of defendants, offenses and back-door accusations in almost every way federal procedure allows. (App. 6, 8, 13, 14, 15, 16, 27, 69, 104-06, 117-18, 124-27, 222-23, 269-70, 413-14, 464-65.) Indeed, on the last occasion he was rebuked for trying "to build up a record." (App. 465.)

II. CAST OF ALLEGED CO-CONSPIRATORS

In addition to the petitioner, the cast of alleged conspirators included:

Gary Lee Ethridge—the alleged head of the alleged bank robber ring. He was convicted on the first, second, third and eighth counts.

Georgia Ethridge—his wife. She was convicted on the first count.

Larry Ferguson—also known as "Kingfish", the alleged member of the ring who was allegedly killed to keep him from talking to the FBI. Ferguson allegedly joined the petitioner in actually committing the first bank robbery in April.

William Eugene Beard—the alleged trigger man in the alleged murder of Ferguson, and one of the alleged gunmen in the second bank robbery. He was convicted on the first, seventh and eighth counts.

James Richard Self—Beard's alleged companion in the second bank robbery in August. He was convicted on the first count.

Sammy Ray Cole—an alleged member of the "ring" who allegedly played a supporting role in get-

aways, etc. He was convicted on the first, second and third counts.

John W. Leeman—an alleged member of the "ring" who testified for the government in return for a promise that the indictment against him would be dropped, and other favors. (R. 1946, 2030-31.) His case was severed and subsequently dismissed.

III. SUMMARY OF TRIAL COURT PROCEEDINGS

The indictment in this case was returned September 26, 1967, just three days after the alleged murder of the co-defendant, Larry "Kingfish" Ferguson. (App. 1, 5.).

The petitioner's present attorney was appointed to represent him three weeks later. (App. 65) On the same day the Court allowed all defendants 10 days to file pleas or motions, and set the case for trial November 13, 1967, "as to all defendants of course." (R. 78.) Later the Judge said it had been set at that early date "because of the importance of it," (App. 66) although it was "one of the newest cases" on the Court's docket. (App. 66-67.)

Pre-trial motions were heard November 6 and 7, 1967, including lengthy proceedings in chambers arising from Leeman's decision to testify for the government in return for promises made to him by the United States Attorney in interviews conducted in the absence of Leeman's attorney, who also represented Beard. (R. 144-439.) The Court denied the defendants any significant relief not agreed to by the United States Attorney. The relief agreed to by the government included severance of the substantive counts charging Beard with possessing a firearm and harboring the petitioner as a fugitive, but not the corresponding overt acts of the conspiracy count. (App. 16-20; 27-28; R. 418-32, 456-470.)

On the motions for change of venue and continuance, the Court was sufficiently concerned about the publicity on this and other bank robbery cases to postpone final

decision until the *voir dire* of prospective jurors. (App. 19, 67, 121-22.)

However, when it developed during the jury selection—which took five days—that some of the prospective jurors were admitting they had been prejudiced by the publicity, the United States Attorney asked for special instructions to discourage them from doing so. (App. 178.)

The last alternate juror seated on the fifth trial day was locked up a total of 29 days, heard evidence on 13 of them, heard arguments of counsel on two, heard the charge of the Court on one, and deliberated on one. Of the other 12 lock-up days, eight were weekend days, one was Thanksgiving, two were yielded to the rigid calendar of the United States Court of Appeals for the Sixth Circuit, and one to an out-of-town appointment of the trial judge. Even on the days the jurors actually heard evidence, they spent many hours in the jury room during legal wrangles.

The government began presentation of its evidence on the sixth trial day (App. 189) by offering nine photographs relating to the murder count. Five of these were such gruesome views of the victim's body that the Court excluded them pending a showing of necessity. (App. 190-91; Ex. 1-9.) One of these was finally admitted in evidence in rebuttal on the last day of testimony. (App. 543.)

The government completed its evidence in chief on December 4. (App. 491.) The petitioner moved for judgment of acquittal at the close of the government's case (App. 491-92), presented no evidence, and renewed his motion at the close of all the evidence on December 11. (App. 546-47.)

The jury's verdict convicting the petitioner as charged was returned December 16, 1967. (R. 3957-59; App. XIII.)

On December 21 the Court sentenced the petitioner to 20 and 10 years, respectively, on the bank robbery and included possession count, to run concurrently, and to an additional, consecutive five-year sentence on the conspiracy count, or a net sentence of 25 years, and judgment was entered accordingly. (App. XIV, 28-29).

The petitioner filed a motion for leave to appeal *in forma pauperis* the same day (Instr. 53) and his notice of appeal was marked filed the same day. (App. 30-31.)

On December 22, the Court entered an order setting a hearing for January 11, 1968, on the defendants' motions for acquittal. (App. 32-33.)

On January 12, 1968, the Court entered an order reciting that a hearing was not necessary and overruling the motions for acquittal. (App. 33-34.)

On January 24, 1968, an order was entered permitting the petitioner and other defendants to appeal in *in forma pauperis*. (App. XV.)

On February 20, 1968, the government moved to dismiss the case against Leeman on the grounds that he had been killed.[1] (App. XVI.)

IV. EVIDENCE AGAINST PETITIONER

The petitioner was first brought into the case by name in a sudden burst of vaguely attributed hearsay on the tenth day of the trial (App. 281-82), and his name was last mentioned in the government's case in chief on the fifteenth day, also by hearsay. (App. 483.) Both references were to his alleged escape from the Tennessee State Penitentiary, a crime that was never proved by any witness claiming personal knowledge of that fact, and was never proved, even by hearsay, to have been committed in pursuance to the alleged conspiracy. The Court admitted the first for use against the petitioner over his objection (App. 282), but the last one apparently was limited to use against Beard (App. 482-83), who was the intermediate extra-judicial declarant there involved.

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[1] So far as counsel can recall, the record never has disclosed the fact that Leeman's death had no connection with the government's constant implications during trial that witnesses against the "robber ring" were in danger of death. In fact, Leeman was shot to death by police, after he opened fire on them during their investigation of a burglary.

Thus, the total evidence directly involving the petitioner extended over less than 1,000 pages of this 4,003-page transcript and less than six of the 13 days on which evidence was heard.

The key testimony that would have to be believed to sustain the petitioner's conviction for the bank robbery of April 24, 1967, however, took up less than 100 pages, and if the uncontested testimony of the bank employees and others merely establishing the *corpus delicti* (R. 2096-2137) be disregarded, the backbone of the evidence connecting the petitioner to the bank robbery of which he was accused, will be found on less than 50 pages of the testimony of two witnesses: the co-defendant Leeman (R. 1967-96), an admitted criminal who sold his testimony for government favors (R. 1946, 2030-31), and Judy Farmer (R. 2489-93, 2509-14, 2518-24), one of the young ladies of pleasure who shared the time, money and beds of the alleged bank robbers between robberies.

If the jury elected to believe the testimony of these two moral degenerates, the portions of their testimony that were clearly admissible against the petitioner were sufficient to support the petitioner's conviction for bank robbery, and also, perhaps, for participating in a conspiracy lasting from about April 21 to June 5, 1967, when he was forcibly withdrawn from the possibility of further participation by FBI agents.

The only purpose—and the probable effect—of all other evidence, insofar as it affected the petitioner's case, was to induce the jury to accept that basic testimony.

And most of this other evidence consisted of a vast web of interlocking and mutually reinforcing extra-judicial declarations by declarants who, with insignificant exceptions, never appeared on the witness stand on the trial to admit having made the statements so as to be cross-examined about the truth of the matters asserted.

The very volume and variety of this mass of hearsay defies clearcut classification and summary within the scope of this statement. In form it ranged from a simple statement of a party to a witness that the party had done a specific thing (*E.g.*, App. 289), to complicated chains such as a vague statement apparently originating with Ethridge and allegedly relayed through Self to Leslie Marie Belcher, who told it to an FBI agent who wrote it down and provided it to the United States Attorney who read it to the jury under the guise of cross-examination of Miss Belcher, his own witness (App. 348), who denied the truth of this and other statements. (App. 348.)[2]

With minor exceptions, none of the extra-judicial declarants admitted on trial that they had made the statements so as to be cross-examined as to the truth of the matters asserted in the statements. All of the co-defendants did testify on the trial, but Beard was the only one who admitted making extra-judicial statements tending to incriminate the petitioner, and he did not claim to have personal knowledge of the incriminating facts related. (*See, e.g.*, R. 3245-46, 3303, App. 513.) Indeed, the government never even implied that Beard could have had any personal knowledge of the bank robbery of which the petitioner was charged.

Often the ultimate alleged declarant was never definitely identified so that the defendants could cross-examine him if he should become available either as a government or defense witness. This was the case in the hearsay that opened the case against the petitioner, which was attributed to one of two alternative declarants, one of whom was dead and the other entirely unidentified. (App. 281-82.) Later Leeman was allowed, over strenuous objections, to

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[2]This astounding procedure was allowed throughout the government's development of the collateral and uncharged crimes of stealing the cars that were allegedly used in the April 24 robbery, (*see, e.g.*, App. 341, 344-57, 369-70, 373, 383), and elsewhere when a a government witness failed to give hearsay as desired (see, *e.g.*, App. 390-91.)

connect the petitioner to the overt act relating to the Orlinda burglary by further hearsay from one of three alternative declarants. (App. 299-304, 317-19.) At another point one of *four* alternative declarants was heard from. (App. 308.)

Larry "Kingfish" Ferguson was identified as the definite or probable ultimate declarant in a very large proportion of the total hearsay, and Ferguson was dead.

Ferguson was first heard from through his alleged dying declarations identifying Beard as the person who had killed him and giving as Beard's reason the alleged fact that Ferguson knew too much about some bank robberies. (App. 202-07.)

Elsewhere Ferguson's unsworn statements—or suggested inferences based on the fact that he had made unspecified statements—were disclosed before the jury in questions and/or answers, apparently on the theory the statements were those made by a conspirator during the course of and in furtherance of the conspiracy. (*See, e.g.*, App. 241-48, 281-82, 288-89, 292-93, 455-56.) In some cases he was the intermediate declarant, as on the occasions that he reported telephone conversations. (*See, e.g.*, App. 444-45.)

Among the most prejudicial statements attributed to Ferguson came in as generalized double hearsay which from its very generality tended powerfully to corroborate Leeman's detailed statement of the petitioner's alleged part in robbing the bank on April 24. This came in the testimony of an FBI agent about a statement allegedly made by Beard after both Beard and the petitioner were in custody:

> Q. Did Mr. Beard make any statement about the Bordeaux Bank robbery at that time?
>
> A. Yes, sir, he did.
>
> Q. Could you characterize the type of statement that Mr. Beard gave you?
>
> A. Yes, sir, I can. It was a detailed description of the Bordeaux Bank robbery of April 24, 1967.

During this statement, it was outlined as to who planned the robbery, when it was planned, who participated in the robbery, who assisted in the robbery, the getaway route used, a hiding place utilized by two members of the organization, and some subsequent activities on that day.

Further, it was indicated the amount of loot each participant got, and some of their activities immediately—of the participants immediately before and following the robbery.

Q. Did he at that time give you the names of the other people involved?

A. Yes, sir, he did.

Q. I won't ask you to state those names, but—

. . .

BY MR. KNIGHT:

Q. He did state the names of each one of these people?

A. Yes, sir, he did.

Q. Did he state the part that each of these people had played in this robbery?

A. Yes, sir, he did (App. 483-84.)

Later, the agent quoted Beard in detail about the fifty dollars in pennies that the robbers allegedly brought out of the bank on April 24 (App. 486-87)—an alleged fact that had been brought in several times previously in various forms of hearsay with the petitioner named as the robber who hauled the pennies. (*E.g.*, App. 308.) Still later the FBI agent said Beard had identified Larry Ferguson as the source of his detailed knowledge. (App. 487-88.)

This same double-hearsay attribution was omitted (although the government had to know it was such) during introduction of Beard's statements to Maxie Carney about the Bordeaux robbery, which also tended to corroborate Leeman's account. (App. 396.)

V. THE PETITIONER'S OBJECTIONS

During pre-trial argument, the petitioner's counsel called to the Court's attention, and the Court recognized, the dangers involved in getting inadmissible evidence before a jury in a mass trial.

> MR. BINKLEY: If they don't, it's going to be before the jury what's been said, and you are not going to be able to erase it from the jury's mind.
>
> THE COURT: That's an inherent risk in any conspiracy case. I will overrule that particular motion. (App. 126-27.)

That particular exchange related to a motion to strike reference in the indictment to the petitioner's escape, but counsel for all parties repeatedly objected to the prejudicial order of proof, the pervasive hearsay, illegally obtained and irrelevant evidence and the manner of getting some of the hearsay before the jury. The petitioner's own counsel joined in objections before any evidence relating directly to him came into the case, and continued to object throughout the trial. (*E.g.*, App. 218, 220, 222-24, 230, 242-43, 245-46, 247-48, 263-64, 269-70, 282, 288, 300, 302-06, 308-09, 318-19, 340-41, 351-52, 354-55, 367-69, 374-78, 401-03, 413-14, 419-20, 464-65, 482, 493, 497, 500-01, 509-10, 518-19, 522-24.)

A very revealing colloquy in the presence of the jury during cross-examination of Georgia Ethridge on the sixteenth day of the trial deserves setting out in full as illustrative of the problems created by the present method of prosecution (emphasis added here):

> MR. BINKLEY: If Your Honor please, I would like to object to that for the same reason just for the record.
>
> THE COURT: Wait a minute, for the same reason, I don't know what you are talking about.

MR. WILSON: If Your Honor please, those statements were not admitted against Mrs. Ethridge.

MR. MERRITT: Oh, yes, they were.

THE COURT: I don't know which particular statements they were, *there have been so many statements.*

MR. WILSON: There was a hearsay statement of a witness named Judy Farmer who testified that Bostic has given her certain information. It was admitted to the jury for limited purposes. It was not considered to be a part of the conspiracy. It was—

THE COURT: No, I think you are wrong about that.

MR. WILSON: Other than those persons who were present.

THE COURT: Admitted for general purposes, contributing to the conspiracy charged in the indictment to rob banks and possess money derived therefrom.

MR. BINKLEY: If Your Honor please, my objection—

THE COURT: And enlist other people in and gain their confidence with respect to the possession of the money.

That's the theory on which I admitted them. Now the jury is going to have to determine whether or not, in the final analysis, those statements were in execution of the conspiracy. That would be a jury question.

MR. WILSON: We have been arguing so long, I've forgotten what I objected to.

THE COURT: I distinctly recall those particular conversations now that you mention the name of the witness Judy Farmer.

MR. BINKLEY: My objection is to the way Mr. Merritt is phrasing his question, because the only

testimony we have was somebody said that Bostic said—

THE COURT: Well, of course the jury will have to determine whether those statements were actually made. That's a jury question also.

MR. BINKLEY: But there's so much going into the jury, *I don't think there's any need to adding to the confusion.*

THE COURT: *The jury may not be confused. I don't know. They are not supposed to be.*

MR. MERRITT: Would you read my question back to me, Miss Mankin?

THE REPORTER (Reading): Bostic, do you know of any reason why he would put you in the bank robbery if you weren't involved? (R. 3158-60.)

VI. THE CO-DEFENDANTS' EVIDENCE

The petitioner moved for judgment of acquittal at the close of the government's case (App. 491-92) and renewed the motion at the close of all the evidence (App. 546-47) without having testified or presented any other proof.

All of the co-defendants on trial presented witnesses in defense, however, and in the course of their testimony a great deal of matter prejudicial to the appellant, including some that was directly incriminating, came before the jury. (*See, e.g.*, R. 3150-60, 3294, 3336, 3341-42, 3344, 3347, 3350-51, 3355, 3557.)

As in the case of the government's evidence, the co-defendants' evidence was directed predominantly to the alleged murder that occurred three months after the petitioner was in custody and in which he was never remotely implicated except to the extent that the dragnet of the conspiracy count tagged him with responsibility for everything that happened.

VII. PROCEEDINGS ON APPEAL

The petitioner and four other defendants prosecuted separate appeals, but the petitioner's separate case was again conglomerated with the cases of others, and all appeals were heard and disposed of together.

The Court of Appeals reduced the contentions of all appellants to four questions it considered "substantial appellate issues." None of the four corresponded directly to any of the 11 questions presented by the petitioner, and all were divorced from any constitutional principles.

The first question considered by the Court did not relate directly to this petitioner at all except as the obvious abuse of the "murder" section of the bank robbery statute, 18 U.S.C. §2113(e), aided in prejudicing the petitioner's ability to defend himself on the unrelated crimes of which he was charged.

Under the second question, as formulated by itself, the Court of Appeals held there was a continuing conspiracy that included the purpose of killing co-conspirators, if necessary, to avoid apprehension, distinguishing *Krulewitch v. United States*, 336 U.S. 440 (1949), and *Grunewald v. United States*, 353 U.S. 391 (1957). On this point, the Court said, in relation to this petitioner:

> As to Bostic, although he had been returned to the penitentiary sometime before Ferguson's murder, there is no evidence that he had renounced or withdrawn from the conspiracy. (424 F.2d at 964; App. 57.)
>
> * * * * * *
>
> We recognize as to appellants Bostic and Cole that there is no specific testimony that they had knowledge of the plan to do away with Ferguson. But there is ample evidence that they knowingly joined and participated in a conspiracy to commit armed robbery of banks. We conclude that the murder actually committed must be viewed as within the reasonable contemplation of those who

> formulated and participated in the bank robbery scheme and was in furtherance of the plan. (424 F.2d at 965; App. 58.)

Under the third and fourth questions the Court held part of the mass of hearsay on which the case was built admissible as a dying declaration and the rest as admissible under the old civil conspiracy rule—that "in conspiracy cases . . . the statements of one of the co-conspirators during the course of and in furtherance of the conspiracy are admissible against all co-conspirators." All authority cited on the last question was 20 years old or more. (424 F.2d at 967; App. 61.)

There was no mention whatever of the petitioner's contention that he had been deprived of his constitutional right of confrontation as interpreted under this Court's more recent decisions.

Most of the petitioner's most serious contentions, including two of the three presented again in the present petition, were summarily disposed of under the rubric of the trial Court's "discretion" plus the following closing comments:

> We find no other material appellate issues.
>
> We believe that these appellants were accorded a fair trial before a careful and able judge. . . . (424 F.2d at 968; App. 62.)

SUMMARY OF ARGUMENT

The petitioner's primary contention is that the conspiracy exception to the hearsay rule as heretofore applied in the federal courts violates the confrontation clause of the Sixth Amendment to the Constitution of the United States as interpreted in *Douglas v. Alabama,* 380 U.S. 415 (1965); and *Bruton v. United States,* 391 U.S. 123 (1968), even as those cases were interpreted by the prevailing Justices in *Dutton v. Evans,* ___ U.S. ___, 39 Law Week 4015 (1970).

This is so because the logic of these cases prohibits the use of narrative declarations of a co-conspirator in a joint

trial unless other defendants have an opportunity to cross-examine.

Even if the conspiracy exception to the hearsay rule be held to be also an exception to the confrontation clause, this case would have to be reversed to comply with the rule of *Jackson v. Denno*, 378 U.S. 368 (1964), requiring procedures to prevent a jury from hearing incriminating evidence until its admissibility had been reliably determined.

Secondarily, it is contended that the case must be reversed within the direct holding of *Bruton* because of inadmissible statements of the co-defendant, Beard, which the Court sought to limit for use against Beard although they contained matter directly incriminatory of Bostic and served little other purpose.

In addition, the petitioner contends the totality of circumstances of this mass show trial deprived him of his liberty without due process of law.

Finally, it is contended that the Court of Appeals erred in holding the petitioner responsible for acts of co-conspirators, including an alleged murder, committed months after he had been returned to the Tennessee State Penitentiary.

ARGUMENT

PROPOSITION NO. 1

THE STAR CHAMBER CONSPIRACY DOCTRINE, PARTICULARLY WITH RESPECT TO ITS FREE-WHEELING EVIDENTIARY RULES, HAS BEEN INVALIDATED BY THIS COURT'S RECENT RULINGS ON THE RIGHT OF DEFENDANTS TO BE CONFRONTED BY THE WITNESSES AGAINST THEM.

A. Historical Note

The common law has been unfairly blamed for the cancerous growth of the conspiracy doctrine in the last 100 years.

The fact is that it originated in the Star Chamber, which hardly commends it in this country as good law:

> 'There can be little doubt that this wide definition of the crime of conspiracy originates in the criminal equity administered in the Star Chamber.' In fact, we are advised that 'The modern crime of conspiracy is almost entirely the result of the manner in which conspiracy was treated by the Court of Star Chamber.' (Jackson, J., concurring in *Krulewitch v. United States,* 336 U.S. 440, 450 (1949), citing 8 Holdsworth, History of English Law, 379 and 382.)

It is true that the English common law courts kept the criminal conspiracy alive after the Star Chamber was abolished, but the few instances of criminal conspiracy to be found in the common law authorities prior to the separation of the colonies (*see, e.g.,* the single limited type mentioned in 4 *Blackstone, Commentaries* *136) hardly provide the doctrine a pedigree that the accomplished common lawyers who wrote the Constitution could be presumed to have recognized as legitimate. Certainly it could not be assumed that they intended to confer on Congress the power

either to define conspiracy to commit crimes as a crime,[3] or the power to make of it a vehicle for evading the specific limitations of the Fifth and Sixth Amendments.

Furthermore, Congress cannot be blamed for the worst features of the monster the conspiracy doctrine has become in the last hundred years. It is the courts that have made conspiracy into the powerful engine of oppression that it has become.

It is the courts that have decided that the indictment for conspiracy need not inform the defendant of the particular acts for which he will be put to answer upon the trial without discussing the impact of their rule-making on the defendants' right to be informed of the nature and cause of the accusation and to be put to answer only for crimes charged in an indictment or presentment. *See, United States v. Negro,* 164 F.2d 168 (2nd Cir. 1947); *United States v. Downing,* 51 F.2d 1030 (2nd Cir. 1931).

It is the courts that decided that co-conspirators may be caused to testify against each other through the medium of in-court recitation of alleged unsworn extra-judicial statements that cannot be tested by cross-examination in court, without consideration of how this affects the defendants' right to be confronted with the witnesses against them. *See, Logan v. United States,* 144 U.S. 263 (1892); citing a case of actual agency and *res gestae,* not conspiracy: *United States v. Gooding,* 12 Wheat. (25 U.S.) 460, 469 (1827).

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[3]It should be noted here that the federal power to define and punish crimes such as those found in this indictment is entirely an incidental power, not a specifically delegated power, and that it is usually exercised as incidental to implied powers, not delegated powers. The Constitution specifically confers on Congress the power to define and punish only crimes relating to counterfeiting, piracies and felonies on the high seas, and offenses against the law of nations. Art. I, § 8, clauses 6 and 10. The power to punish treason as defined in Art. III, § 3 is rather clearly implied. A more doubtful implication from Art. II, § 4, might add bribery to the list.

Fortunately, after the prohibition era reached what Mr. Justice Jackson called "the height of . . . frenzy" in cases like *Allen v. United States,* 4 F.2d 688 (7th Cir. 1925) (see *Krulewitch v. United States, supra,* 336 U.S. at 454, fn. 20), the courts have come to recognize that the monster needed curbing. In *Grunewald v. United States,* 353 U.S. 391, 404 (1957), Mr. Justice Harlan, speaking for a unanimous Court, said:

> Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not be again detailed. See Jackson, J., concurring in *Krulewitch v. United States, supra.*

In a footnote the court cited *Delli Paoli v. United States,* 352 U.S. 232 (1957), decided at the same term, as supporting this disfavor, apparently because of the *dicta* warning trial courts to be careful in applying in a joint trial of multiple alleged co-conspirators the rule it there upheld:

> 'Relevant declarations or admissions of a conspirator made in the absence of the co-conspirator, and not in furtherance of the conspiracy may be admissible in a trial for conspiracy as against the declarant to prove the *declarant's* participation therein.' (278 U.S. at 238, quoting *Lutwak v. United States,* 344 U.S. 604, 618; emphasis by the Court in *Lutwak.*)

Delli Paoli's warning was strengthened by its emphasis on the careful manner in which the particular trial judge in that case had segregated the presentation of the declaration with lengthy and emphatic instructions to the jury that it could be used only against the declarant and not against Delli Paoli.

And it is significant that the Court did not consider the applicability of the confrontation clause to the situation. For that matter, Mr. Justice Frankfurter, dissenting, also discussed the issue without reference to the confrontation

clause, and the parties and the judges of the court below likewise appear to have considered the matter in the uncharted sea of their several notions of justice and good public policy, not what the law commands. (See opinions below, 229 F.2d 319, 320, 322 (2nd Cir. 1956); briefs of counsel at 1 L.Ed.2d 1728.

But prosecutors and trial judges apparently had their own notions of public policy, and convicted defendants kept knocking on the door of this Court complaining about the admission of out-of-court declarations.

Contemporaneously, and often in the same cases, the declarants themselves also claimed trial court procedures in judging the admissibility of alleged confessions were not fair.

In both areas, the Court took a long new look at the language of the Bill of Rights and the practical limitations of jury trials.

The stage was set for the series of decisions on which the petitioner relies in support of his first proposition.

B. Constitution Reconsidered

In 1964, this Court decided that it was a deprivation of a defendant's liberty without due process of law to allow a jury to know about an extra-judicial confession allegedly made by him until after it had been determined, upon a hearing designed to obtain a reliable result, that it was, in fact, a voluntary confession. *Jackson v. Denno*, 378 U.S. 368 (1964). It specifically disapproved the New York rule that allowed the jury to determine for itself whether the confession was admissible. In a footnote to a paragraph in which it expressed doubt about the jury's ability to separate the issue of truthfulness from the issue of voluntariness, the Court said significantly, 378 U.S. at 388:

> See *Rideau v. Louisiana*, 373 U.S. 723, 727: 'But we do not hesitate to hold, without pausing to

> examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.' See also *Delli Paoli v. United States,* 352 U.S. 232, 248: 'The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' (Dissenting opinion of Mr. Justice Frankfurther relating to use of a confession of a co-defendant under limiting instructions.) *Krulewitch v. United States,* 336 U.S. 440, 453: 'The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf. Blumenthal v. United States,* 332 U.S. 535 (539), 559, all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.,* 2 Cir., 167 F.2d 54. (Concurring opinion of Mr. Justice Jackson relating to limiting instructions concerning use of declarations of co-conspirators.) . . .

The message should have been clear, but few lower court judges appeared to read it. Among those who did was Chief Justice Traynor in *People v. Aranda,* 63 Cal.2d 518, 529:

> Although Jackson was directly concerned with obviating any risk that a jury might rely on an unconstitutionally obtained confession in determining the defendant's guilt, its logic extends to obviating the risks that the jury may rely on any inadmissible statements.

In 1965, the Court decided two confrontation cases the same day, holding in both that the right of confrontation includes the right to cross-examine the witnesses. *Pointer v. Texas,* 380 U.S. 400 (1965); *Douglas v. Alabama,* 380 U.S. 415 (1965). All the Justices concurred in both cases that the right of cross-examination had been denied in violation of the due process clause of the Fourteenth Amendment, but two of them did not concur in the majority's

view that the confrontation clause was "incorporated" in the Fourteenth Amendment.

In *Douglas*, the Court held the right of cross-examination was denied where the prosecuting attorney read a purported confession to a co-defendant who was being tried separately and invoked the Fifth Amendment when called by the State as a witness against Douglas. The witness declined to answer questions based on the reading of the confession. The Court said: "Hence, effective confrontation of (the witness) was possible only if (the witness) affirmed the statement as his."

In 1966, the Court adopted an amendment to Rule 14, Federal Rules of Criminal Procedure, to provide specifically that "In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions by the defendants which the government intends to introduce in evidence at the trial." The advisory committee notes strongly indicated that the purpose was the same as the purpose of the *Jackson* rule: to provide a pre-trial remedy to prevent the jury from hearing inadmissible evidence that might cause a mistrial or reversal, citing three Fifth Circuit cases.[4]

In 1968, while the court reporter was still struggling to turn out the voluminous transcript of the proceedings for the appeal in the present case, the Court pulled all these cases together in *Bruton v. United States*, 391 U.S. 123 (1968), overruled *Delli Paoli*, and held, 391 U.S. at 137, that:

> Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial

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[4] *Schaffer v. United States*, 221 F.2d 17 (5th Cir. 1955); *Barton v. United States*, 263 F.2d 894 (5th Cir. 1959); *Belvin v. United States*, 273 F.2d 583 (5th Cir. 1960). It is worth noting in this connection that the trial judge in the present case expressed a disparaging view of the decisions of the United States Court of Appeals for the Fifth Circuit (App. 378.)

> we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all.

Shortly afterward this holding was recognized as retroactive. *Roberts v. Russell,* 392 U.S. 293 (1968).

This holding is directly applicable to a large portion of the hearsay in the present record, particularly the extra-judicial statements of Beard, which were almost all made after the petitioner had been returned to prison. Many of Beard's statements were in fact admitted for use only against Beard. (*See, e.g.*, App. 396-97, 404, 482, 488.)

However, *Bruton's* implications go much further, particularly in the light of its reliance on *Jackson v. Denno, supra; Douglas v. Alabama, supra;* the adoption of Rule 14, *supra,* and *People v. Aranda, supra.*

Earlier this term, the Court considered these implications as applied to a statement admitted against a defendant under a state statutory rule that allowed the use of extra-judicial statements of conspirators against co-conspirators during the course of a conspiracy whether or not they were made to effect the objects of the conspiracy, provided the conspiracy was first proved. *Dutton v. Evans,* ___ U.S. ___, 39 Law Week 4015 (1970).

In that habeas corpus case, the Fifth Circuit Court of Appeals held the statutory rule violated the petitioner's constitutional rights and this Court reversed, 5-4, but the majority could not agree on an opinion.

The principal difficulties that divided the Court in that case were apparently (1) the fear of the majority Justices that following *Bruton's* logic to eliminate the conspiracy exception to the hearsay rule, would eliminate all hearsay from criminal trials, and (2) the view that the particular isolated extra-judicial statement there involved was really too insignificant to justify a reversal.

We do not think the second point can be seriously argued about the mass of interlocking hearsay involved in the present case. Neither do we believe the Court can well compare this case with *Harrington v. California*, 395 U.S. 250 (1969). The Court of Appeals did not rely on harmless error; it held there was no error. Indeed, it relied upon some of these declarations itself in affirming the petitioner's conspiratorial connection with the murder allegedly committed three and a half months after he went to prison.

As to the fear that the *Bruton-Jackson-Douglas* logic will be followed to the extreme of eliminating all hearsay from criminal trials, we respectfully suggest it is unfounded. The logic of those opinions extends no further than to a rather clearly defined classification directly related to the words of the confrontation clause, namely, the narrative declarations of alleged accomplices and co-conspirators, whose testimony even under oath and subject to cross-examination is always viewed with suspicion.

Furthermore, a great part of the hearsay in the present record would fit very well in the alternative theories advanced by Mr. Justice Harlan for explanation of the *Douglas* decision. He said that case—

> . . . is most easily dealt with by viewing it as a case of prosecutorial misconduct. Alternatively, I would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of guilt of an accused absent some circumstances of adoption.

The present case also fits very largely into the cases classified by Mr. Justice Stewart in the majority opinion as involving "the use, or misuse, of a confession made in the coercive atmosphere of official interrogation," as involving a "suggestion of prosecutorial misconduct," and as involving "a joint trial." And considering the number of the statements involved here, the denial of cross-examination could well be classified as "wholesale."

At a minimum, *Jackson v. Denno* requires that the conditions attached to the federal conspiracy hearsay exception should be determined by the trial court after an adequate hearing before any extra-judicial statement by an accomplice is admitted into evidence.

PROPOSITION NO. 2

THE PETITIONER WAS DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW BY THE TOTALITY OF CIRCUMSTANCES OF THIS MASS SHOW TRIAL FROM THE PREJUDICIAL JOINDER OF OFFENSES AND DEFENDANTS IN THE INDICTMENT TO CONFUSION OF ISSUES ON TRIAL AND APPEAL.

A. Prejudicial Joinder

The concurring opinion of Mr. Justice Jackson in *Krulewitch v. United States, supra,* 336 U.S. at 445, has been virtually adopted as the opinion of this court in subsequent opinions, particularly *Grunewald v. United States, supra,* and *Bruton v. United States,* as the most cogent expression of this Court's revulsion at the abuse of the "elastic, sprawling and pervasive offense" of conspiracy.

A whole generation of young prosecutors, out to make a reputation for themselves by prosecuting "gangs" and "rings," rather than individual substantive offenders, or to make their jobs easier, have ignored the warnings or sought gimmicks like subsidiary conspiracies to evade them. It is still true that:

> The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice. (336 U.S. at 445-46.)

The record of the present case shows clearly that the conspiracy count was a mere ruse. Its five-year maximum penalty sounds like a vacation weekend compared to the

heavy penalties prescribed for the substantive offenses of bank robbery and murder.

On this record it is clear that the government could easily have exposed each of the defendants to the probability of sentences far in excess of the five-year maximum for conspiracy in one or more of three trials of less than one week each on charges of (1) a successful bank robbery on April 24, 1967; (2) an unsuccessful bank burglary on May 15, 1967; and (3) a successful bank robbery on August 1, 1967. Instead, the government chose to conglomerate two of these primary cases with (1) a spuriously "federal" murder count against two of the defendants who ought to have been left to the tender mercies of the State of Tennessee with regard to murder; (2) an essentially irrelevant but prejudicial charge of illegal possession of a firearm under a statute patently violative of the Second Amendment; (3) a charge against one defendant of harboring this petitioner as a fugitive; and (4) a conspiracy count that could add nothing except to provide a basis for conglomerating all these charges into a single indictment and permitting the use of loose evidentiary rules.

This conglomerate trial was necessarily prejudicial because inconsistent with the right of every defendant to have each charge against him tried on the basis of evidence relevant and material to that particular charge without contamination and confusion by inflammatory evidence of other wrongdoing by other persons or on other occasions. It was particularly prejudicial to the petitioner who was in prison at the times of the second successful bank robbery and the murder.

Without the conspiracy count, the joinder of the other seven counts would not even have been permissible under Rule 8, Federal Rules of Criminal Procedure. (See, *United States v. Solomon*, 26 F.R.D. 397 (D. Ill, 1960).

Even if the prejudice had not been obvious from the face of the record at the outset, it should have become obvious to the Court almost from the first moment the case came

to its attention so as to require it to inquire, of its own motion, if necessary, whether a severance should not be ordered. "Rule 14 . . . does not specifically require a motion for severance . . . The wording of the Rule would indicate a continuing duty during the trial on the part of the court to avoid prejudice as a result of a joinder." *United States v. Gougis*, 374 F.2d 758, 762 (7th Cir. 1967).

At a bond hearing for co-defendants before counsel had even been appointed for the petitioner, the Court had a particularly informative view of the government's approach to the case and of collateral matters the government was prepared to bring up to support its case, including alleged threats by Gary Lee Ethridge to co-defendants in other criminal cases (R. 12-32), an alleged attempt by James Richard Self to kill Larry Ferguson (R. 33-39, 41, 45-54), and an illegal entry and search of a private home where one of the defendants was arrested for the murder of Ferguson. (R. 40-44).

And if that were not enough to put the Court on inquiry, the defendants certainly brought the matter to the court's attention properly and repeatedly by various motions seeking relief from prejudicial joinder, by objections to highly prejudicial evidence offered primarily against only one or a few of the defendants, by motions for mistrial, by conflicting motions for continuance on the part of some co-defendants and for speedy trial on the part of others, and by motions for change of venue because of prejudicial publicity. See particularly present counsel's arguments and the United States Attorney's responses at R.323-38, 376-80, and App. 282, and the colloquy at App. 464-65.

If this was not a case for severance or mistrial because of prejudicial joinder of defendants and offenses, it is difficult to conceive of a case in which Rule 14 would ever have any application at all.

B. Other Prejudicial Matters

Without being exhaustive, the following highlights of the prejudicial manner in which this trial was conducted are submitted to the Court's consideration:

1. The haste to bring this headline-getting "important case" to trial in an atmosphere of publicity sufficiently serious for the court to postpone decision on motions for change of venue and continuance until the *voir dire* (App. 121-22) was pointed up by the Court's acknowledgment that this was one of the newest cases on its docket. (App. 66-67.)

2. In qualifying the jury, the government attempted to eliminate all jurors who would entertain the natural and proper suspicions that should arise in the minds of any free American about the government's promises of immunity to a leading member of this allegedly blood-thirsty gang of criminals in return for testimony to convict the others (*see*, App. 71, 73, 273, R. 2030-31), and he suggested special instructions to discourage jurors from admitting they had been prejudiced by newspaper publicity. (App. 178.)

3. The government chose to begin its case with its evidence on the murder count (R. 1158-59), and to begin the evidence on the murder count by offering the most inflammatory evidence available—namely, gruesome pictures of the alleged murder victim which were not even necessary to prove any relevant fact in the case. (App. 189-91.) Logically and chronologically, this should have come last after proof of the federal offenses to which it was an ill-connected appendage at best. Present counsel can conceive of no purpose that would have led to this order of proof except the purpose of inflaming the jury at the outset. No other has yet been suggested in this record.

4. After the picture ploy had been partially blocked (albeit with full notice to the jurors what sort of evidence was being kept from them), government counsel skimmed as rapdily as possible over other preliminary matters to bring

the jury's attention to the fact of a co-defendant's arrest on a state murder warrant in the home of the alleged head of the bank robbery ring, and the discovery of a pistol on the latter's person. (App. 192-98.) Both the warrant and entry were invalid. *Giordenello v. United States*, 357 U.S. 480 (1958); *Miller v. United States*, 357 U.S. 301 (1958). The United States Attorney admitted that his purpose in trying to get the pistol into evidence was to indicate to the jury that here was a man who was going around armed (albeit in his own home and with a weapon never shown to have any connection with any offense). (App. 257.) This cynical effort to inflame the jury by evidence that was both illegally seized and of doubtful relevance consumed an inordinate amount of time, a very prejudicial amount of it in the presence of the jury. (*E.g.*, R. 1230-53, 1261-63, 1867-88, 1894-1930.)

5. Throughout the trial, government counsel repeatedly emphasized essentially collateral matters that were of little or no probative value on the particular charges in this indictment but of highly inflammatory nature, such as the appellant's escape from the penitentiary, which was never established by anything but hearsay and was never shown even by hearsay to have been effected for the purpose of joining or furthering the conspiracy (App. 281-82, 290-91, 390-91, 414); the alleged thefts of the automobiles allegedly used in the robberies, none of which was shown to have been stolen for the purpose of the conspiracy and one of which was clearly stolen in an entirely unconnected lark by a group of drunken teenagers (R. 1162, 1166; App. 284, 335-50, 359-61, 364-65, 381-87); unconnected prior crimes and incarceration of various parties and non-parties. (R. 1743; App. 241-42, 278-79, 361, 365, 381.)

6. The government made repeated attempts to convince the jury by innuendo that the defendants had terrorized government witnesses (*E.g.*, App. 345, 372, 380), and at

one point blatantly and successfully asked the court in the presence of the jury to instruct a government witness on the laws of perjury. (App. 372.) Compare the court's treatment of defense counsel's cross-examination of a government witness. (App. 357-58.)

7. Throughout the trial government counsel constantly used improper repetition to drive home both legitimate and prejudicial testimony for maximum prejudicial effect, often using the interruption of objections as an excuse for repetition of the objectionable testimony. (*E.g.*, R. 1524, 1525, 1643, 1646, 1651, 1652, 1655-56, 1663, 1747, 1753, 1757, 1764, 1835, 1857, 1932, 1962, 1964, 1967, 1969, 1970, 1974, 1977, 1982, 1987, 1990, 2001, 2210, 2212, 2216-17, 2220, 2299, 2318, 2509, 2509-13.)

8. The court made no effort to require the government to segregate inadmissible statements to aid the jury's difficult task in the manner the trial court used in *Delli Paoli, supra*, nor did he give clear and immediate instructions with the admission of each declaration. Although hearsay objections began at page 1236 of the transcript (App. 195), the court's first instruction indicating any limitation on hearsay will be found at pages 1748-52 (App. 231-32). Thereafter, his total instructions, including only very limited mention of the conspiracy exception and its proper application, may be found at App. 236, 240-41, 249-50, 251-52, 282, 341, 342, 347-48, 352, 354, 355, 369-70, 378-79, 384-85, 389-90, 397, 399, 400, 410-11, 421, 445-47, 461, 482, 488, 548-49, 553-54, 556, 558-61. It should be particularly noted that the "instructions" were often merely colloquy with counsel in the hearing of the jury:

> THE COURT: I don't see, if there's a conspiracy established, then the declarations or statements of members of the conspiracy are admissible in evidence. (App. 282.)

9. The extraordinary manner in which government counsel were permitted to use extra-judicial statements of

interviews by FBI agents of the government's own witnesses, many containing compound hearsay, on grounds the government was surprised by the witnesses' failure to give the hearsay exactly as expected. Most of these came up in the lengthy development of the collateral and uncharged crimes of stealing getaway cars. (App. 338-91.)

It is respectfully submitted that these and other circumstances rendered it impossible for the petitioner to obtain a fair trial. Only a reading of the full record can really bring home the full measure of the petitioner's prejudice.

PROPOSITION NO. 3

THE COURT OF APPEALS ERRED IN PRESUMING THAT THE PETITIONER CONTINUED TO PARTICIPATE IN THE THE ALLEGED CONSPIRACY OR TO BE RESPONSIBLE FOR ACTS OF OTHERS AFTER HE HAD BEEN RETURNED TO PRISON.

The Court of Appeals held that the petitioner continued to be responsible as a co-conspirator for the acts of co-conspirators after his arrest on June 5:

> As to Bostic, although he had been returned to the penitentiary sometime before Ferguson's murder, there is no evidence that he had renounced or withdrawn from the conspiracy. (424 F.2d 964; *see, also,* further comment on p. 965; App. 57-58.)

This holding is in direct conflict with *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2nd Cir. 1961), in which it was held that the arrest of a conspirator removes the presumption of continuing participation by him in the conspiracy, and shifts the burden to the government to show his continued participation.

In the case of *Sandez v. United States*, 239 F.2d 239, 243 (9th Cir. 1956), the Court said:

> Before considering specific conversations, it becomes necessary to determine when the conspiracy ended. We think that the moment of any conspirator's arrest is decisive as to him; even if it should be maintained that the arrest of the first conspirator is not conclusive as to all. At that moment, the conspiracy has been thwarted, and presumably no other overt act contributing to the conspiracy can possibly take place at least so far as the arrested conspirator is concerned. (Citing *Fiswick v. United States*, 379 U.S. 211, 217 (1946).)

Here, the petitioner was tagged with joint responsibility in the indictment for infamous crimes committed months after he went to prison, and was forced to spend a major portion of his lengthy trial listening to inflammatory evidence of crimes in which he could not have participated and in which neither the government, the trial court, nor the Court of Appeals ever suggested he had joined.

CONCLUSION

The petitioner respectfully contends that his conviction on all three counts should be reversed, and the case should be remanded to the trial court for a new trial after severance of the conspiracy count. In the alternative, the case should be remanded to the Court of Appeals for reconsider-

ation in the light of the cases herein discussed and in the light of the correct rule as to the effect of the petitioner's arrest prior to the last two overt acts.

Respectfully submitted,

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